

PUBLIC VERSION

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September 14, 2018

By ECFS

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: **Renewed Motion of AT&T Services, Inc. to Amend Protective Order, *In the Matter of Iowa Network Access Division Tariff F.C.C. No. 1*, WC Docket No. 18-60, Transmittal No. 36**

Dear Ms. Dortch:

AT&T Services, Inc. ("AT&T") submits for filing the **Public Version** of its Renewed Motion to Amend Protective Order in the above-referenced proceeding. Consistent with the Commission's rules and the March 26, 2018 Protective Order entered by the Commission Staff, AT&T has redacted all Confidential Information from the **Public Version**, which it is filing by ECFS.

AT&T is also filing by hand with the Secretary's office one hard copy of the **Confidential Version** of this submission. In addition, copies of all versions of the submission are being served electronically on Aureon's counsel. Two copies are also being provided to Joseph Price at the Wireline Competition Bureau.

Please contact me if you have any questions regarding this matter.

Sincerely,



James F. Bendernagel

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Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

**Iowa Network Access Division
Tariff F.C.C. No. 1**

WC Docket No. 18-60

Transmittal No. 36

**RENEWED MOTION OF AT&T SERVICES, INC.
TO AMEND PROTECTIVE ORDER**

Pursuant to 47 C.F.R. § 1.41, AT&T Services, Inc. (“AT&T”) respectfully submits this renewed motion for a limited amendment of the Commission’s March 26, 2018 Protective Order (“*Protective Order*”). More specifically, AT&T requests that the *Protective Order* be amended to permit AT&T’s internal cost consultant, Daniel P. Rhinehart, to review confidential documents that Iowa Network Services, Inc. d/b/a Aureon (“Aureon”) has submitted, and will later submit, in connection with the revised tariff that Aureon has been directed to file within sixty calendar days of the Commission’s July 31, 2018 Memorandum Opinion and Order (“*Rate Order*”).¹

As explained in greater detail below, the Commission’s *Rate Order* directs Aureon in its revised tariff filing to address issues that Mr. Rhinehart raised in declarations that he submitted in connection with this investigation and the AT&T Complaint proceeding.² Indeed, in the *Rate*

¹ AT&T previously submitted a motion to amend the *Protective Order*, which Aureon opposed. See AT&T Motion to Amend Protective Order and for Expedited Ruling (dated Apr. 23, 2018) (“AT&T Motion to Amend”); Aureon Opposition (dated Apr. 30, 2018); AT&T Reply in Support of Motion to Amend (dated May 2, 2018); AT&T Supp. Reply in Support of Motion to Amend (dated May 30, 2018); Aureon Response to AT&T Supp. Reply (dated June 4, 2018). The Commission granted AT&T’s request for an expedited filing schedule, but the Commission has not ruled on the underlying motion to amend. See Order, *In the Matter of Iowa Network Access Division Tariff F.C.C. No. 1*, WC Docket No. 18-60, Transmittal No. 36 (Apr. 25, 2018).

² In support of its rate manipulation claims, AT&T has thus far submitted a total of six declarations from Mr. Rhinehart, who has extensive experience in cost of service ratemaking. Three of these

Order, the Commission specifically asked Aureon to explain the basis for its assertion that the cost allocation approach proposed by Mr. Rhinehart was “overly simplistic” given the nature of Aureon’s network. *Rate Order*, ¶ 86. In order to fully respond to Aureon’s forthcoming submission, AT&T and Mr. Rhinehart will need full access to the confidential material Aureon submits in support of its revised rate.

Accordingly, AT&T requests that the Commission modify the *Protective Order* to permit Mr. Rhinehart to have access to all of the confidential material that Aureon presents in support of its revised rates. AT&T has discussed this motion with Aureon’s counsel but Aureon has refused to consent to the motion.

BACKGROUND

In the *Rate Order*, the Commission identified multiple deficiencies in the cost support that Aureon submitted in connection with its February 22, 2018 revised tariff filing, particularly as it relates to the allocation of Cable & Wire Facilities (“CWF”) costs. More specifically, the Commission found that:

- *Fair Market Value* - Aureon failed to demonstrate that the Filed Lease Expense charged by Aureon’s nonregulated Network Division is lower than the fair market value (“FMV”) of the facilities being leased; and
- *Fully Distributed Cost* - Aureon did not demonstrate that its Filed Lease Expense is lower than the fully distributed cost of the facilities being leased because Aureon:
 - Failed to produce a formal calculation of the fully distributed cost;

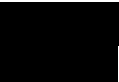
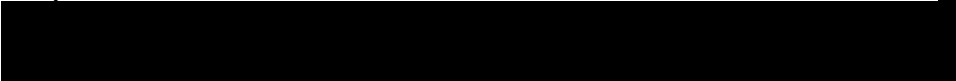
declarations were submitted in the complaint proceeding and were attached as exhibits to the Opposition that AT&T filed in this tariff investigation. *See* AT&T Ex. 1 (“Rhinehart Initial Decl.”); AT&T Ex. 2 (“Rhinehart Reply Decl.”); AT&T Ex. 3 (“Rhinehart Supp. Decl.”). AT&T submitted the remaining three declarations in connection with this proceeding: one in support of AT&T’s Petition to Reject or Suspend (“Rhinehart Rate Decl.”), another in support of AT&T’s Opposition to Aureon’s Direct Case (“Rhinehart Supp. Rate Decl.”), and the final one in support of AT&T’s Surrebuttal (“Rhinehart Second Supp. Rate Decl.”).

- Utilized central office equipment (“COE”) and CWF allocators that do not comply with the Commission’s affiliate transaction rules;
- Used an inappropriate method of allocating CWF expense; and
- Did not properly adjust its allocators to account for CEA and nonregulated traffic sharing use of the same circuits.



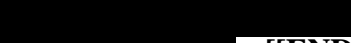

Rate Order, ¶¶ 52, 123.

To correct these deficiencies, the Commission directed Aureon to submit a new rate filing within 60 calendar days and to specifically respond to the following issues:

- *Fair Market Value*

- Either demonstrate compliance with the FMV requirement or seek a waiver; and
- Respond to AT&T’s assertions that **[[BEGIN CONFIDENTIAL]]** 
 **[[END CONFIDENTIAL]]** *Id.* ¶ 62.

- *Fully Distributed Costs*

- Utilize separate allocators for COE and CWF costs (*id.* ¶ 72);
- Include calculations based on forecasted data (including circuit forecasts) for each of the calendar years 2018, 2019, and 2020, and select for 2018 (Aureon’s test year) for each of its pertinent allocators based on the lowest allocator (to regulated activity) among 2018, 2019, and 2010 for each type of cost (*id.* ¶ 78);
- If Aureon projects **[[BEGIN CONFIDENTIAL]]** 
 **[[END CONFIDENTIAL]]** it must explain why. It must also explain the reason for **[[BEGIN CONFIDENTIAL]]** 
 **[[END CONFIDENTIAL]]** (*id.* ¶ 79);
- Take a more “nuanced” approach to determining the proper CWF allocator and recalculate its cost-based rate, including:
 - A full elaboration of the rationale for that approach, along with complete data (including, as relevant, circuit inventories);

- A response to AT&T's claims regarding the manner in which a wholesale customer, such as the Access Division, would actually lease circuits on Aureon's network, as well as the relevance of Aureon's nonregulated DS-3 pricing as it compares to any DS-3 pricing that could be derived from Aureon's CWF allocation methodology (*id.* ¶ 89);
- Refile cost support within 60 days that includes further justification for the allocation of CWF between DS-1 circuits and circuits of higher capacity and between regulated and nonregulated services, which should include:
 - All relevant data for all circuit types in the study, including an explanation of the regulated and nonregulated services provided over those circuits and a circuit inventory matching that explanation;
 - An amended fully distributed cost study that includes a spreadsheet showing the calculation of separate COE transmission and CWF cost allocations and employing separate COE transmission and CWF factors rather than a blended factor (*id.* ¶ 90); and
- Use a projected balance of regulated and nonregulated usage of its DS-1 circuits for 2018, 2019, and 2020 (*id.* ¶ 91).

In reaching these conclusions, the Commission relied heavily on the rate presentations made by AT&T. And those presentations were, in turn, based on declarations submitted by Mr. Rhinehart, both in the complaint proceeding and in this tariff investigation. *See supra* note 2. For example, as noted above, the Commission has directed Aureon to “discuss the relevance and accuracy of AT&T’s claims regarding the manner in which a wholesale customer, such as the Access Division, would actually lease circuits for use [on] Aureon’s network.” *Rate Order*, ¶ 89. AT&T’s claims in this respect are based principally on the declarations of Mr. Rhinehart. *See, e.g., Rate Order*, ¶ 89 n. 282 (citing AT&T Opp. at 67-68 and AT&T Surrebuttal at 38, which in turn cite extensively to Mr. Rhinehart’s declarations). Likewise, as explained in greater detail below, AT&T’s claims regarding the cost allocation issues identified by the Commission are based on Mr. Rhinehart’s declarations.

ARGUMENT

In light of the central role that Mr. Rhinehart's prior declarations have had on both this proceeding and the AT&T Complaint proceeding, the Commission should amend the *Protective Order* to permit Mr. Rhinehart to view any confidential material Aureon has submitted, or that it will later submit in support of its revised rate filing. This amendment is justified, for a number of reasons:

First, most of the issues that Aureon has been directed to address in its revised filing directly relate to the issues that Mr. Rhinehart raised in his various declarations. In fact, the central question at issue is whether the cost allocation method Mr. Rhinehart proposed should be accepted, or rejected as an oversimplification as Aureon contends. *See Rate Order*, ¶¶ 86, 89. In its Rebuttal, Aureon contended that Mr. Rhinehart's analysis **[[BEGIN CONFIDENTIAL]]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **[[END CONFIDENTIAL]]** *See* Aureon Rebuttal at 49.

Yet Aureon failed to provide any of the **[[BEGIN CONFIDENTIAL]]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **[[END CONFIDENTIAL]]** To the extent that Aureon

³ Compare, e.g., Aureon Rebuttal at 50 **[[BEGIN CONFIDENTIAL]]** [REDACTED]

[REDACTED]

addresses this issue in its next submission and critiques Mr. Rhinehart's analysis, Mr. Rhinehart should have the opportunity to review the data and respond.

Similarly, the Commission has directed Aureon to use separate COE transmission and CWF allocators in its revised rate submission, rather than a weighted average of the two. *See Rate Order*, ¶ 72. In so ordering, the Commission agreed with the analysis that AT&T put forward in its rate presentation, rather than the analysis posited by Aureon and its declarants. *See id.* And AT&T based its analysis on Mr. Rhinehart's declarations, including the one Mr. Rhinehart submitted in support of AT&T's Opposition. *See* Opp. at 70-71; Rhinehart Supp. Rate Decl. ¶ 48 ("In its alternative rate calculation, Aureon allocates COE investment, CWF investment and CWF expense between Aureon's CEA service and its other non-regulated services, using a single allocation factor of 64%. ... The assumptions used to calculate depreciation expense and other trailing assets and expenses in the Part 64 and Part 36 Separations models for these two asset classes undoubtedly differ."). Because Mr. Rhinehart's analyses played such a central role in the conclusions reached by the Commission's *Rate Order*, preventing Mr. Rhinehart at this juncture from fully responding to Aureon's forthcoming submission on these issues is fundamentally unfair and would deprive the Commission of a complete record.

Second, there is no legitimate concern that the information Aureon has submitted (and will submit) would be misused by Mr. Rhinehart. As pointed out in AT&T's prior motion, the Commission's rules generally permit internal consultants to have access to confidential information, provided they are not involved in competitive decision-making and are "requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare

[[END CONFIDENTIAL]]

material for the express purpose of formulating filings.”⁴ Mr. Rhinehart is not involved in competitive decision-making, and Aureon acknowledged as much in its Answer to AT&T’s Complaint, characterizing Mr. Rhinehart as nothing more than a “professional witness.”⁵ Moreover, experts like Mr. Rhinehart are subject to the same sanctions as counsel, and Mr. Rhinehart would be bound by the confidentiality provisions in the *Protective Order*, just as he is bound by similar confidentiality provisions in the protective order entered in the AT&T Complaint proceeding.

Further, Mr. Rhinehart has for two years been given access to comparable information in the Complaint proceeding. Aureon granted Mr. Rhinehart access to this data (for 2006-2016) in connection with that proceeding, and it further granted Mr. Rhinehart permission to use the 2006-2016 data in connection with this tariff investigation. *See* Aureon Opp. to AT&T Motion to Amend, at 2 (“Aureon is willing, as an accommodation to AT&T, to relax the use restriction in the Protective Order governing the Complaint Proceeding to enable [Mr. Rhinehart] ... who [was] permitted access to certain documents in that proceeding to use that information in this investigation.”). During these two years, there is no evidence whatsoever that Mr. Rhinehart has misused that access. Accordingly, Aureon’s objection to Mr. Rhinehart’s use of the data from subsequent years (2017-2018) is unjustified.

Third, there is no danger that permitting Mr. Rhinehart to access confidential material would invite broader access or prejudice other parties. Only one other party joined AT&T’s initial

⁴ *In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Info. Submitted to the Comm’n*, 13 FCC Rcd. 24816, App’x C, ¶ 7 (1998) (“Report and Order”). *See also* AT&T Motion to Amend, at 6-11.

⁵ *See* Aureon Answer, Decl. of Jeff Schill, ¶ 4, *AT&T Corp. v. Iowa Network Services, Inc., d/b/a Aureon Network Services*, Proceeding Number 17-56 (June 28, 2017). *See also* AT&T Reply in Support of Motion to Amend, at 7-8.

Motion to Amend,⁶ and no other party has submitted technical data like AT&T and Mr. Rhinehart. Rather, they apparently have been content to rely on AT&T's submissions. Given that history, the possibility that other parties might seek access to this material appear to be remote.

Finally, to the extent Aureon renews its claim that the *Rate Order* requires it to produce data that is even more confidential than the data that Mr. Rhinehart was previously permitted to review, Aureon should be required to substantiate that claim. Tariff proceedings are historically open, *see* Report and Order ¶ 26, and it is therefore Aureon's burden to justify any "additional degree of protection" that it wishes to have afforded to its confidential information.⁷ In opposing AT&T's Motion to Amend, Aureon asserted that the information it was being required to produce was "far broader than the information provided in the Complaint Proceeding" and was otherwise particularly sensitive. Aureon Opp. at 3-5; *see also* Aureon Response to AT&T Supp. Reply, at 3-4 ("Contrary to AT&T's claim, Aureon already has produced different – and much more competitively sensitive – information in this investigation than it had previously."). Yet the record contradicts these assertions, as Aureon's submission included—and was otherwise based on—the same **[[BEGIN CONFIDENTIAL]** [REDACTED]

[REDACTED] **[[END CONFIDENTIAL]]** This includes Annex 3, which Aureon misleadingly characterized as a "unique" exhibit. *See* Aureon Response, at 3. The data that Aureon ultimately produced regarding the cost allocation issues was simply an update of data that Aureon had previously produced in the AT&T Complaint proceeding and that Mr. Rhinehart had already been permitted to review.

⁶ *See* Motion of Sprint Communications Company L.P. Joining AT&T Services, Inc.'s Motion to Amend Protective Order and for Expedited Ruling (dated Apr. 30, 2018).

⁷ *See In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Info. Submitted to the Comm'n*, 13 FCC Rcd. 24816, ¶ 26 (1998).

CONCLUSION

In view of the foregoing, AT&T requests that the Commission amend the *Protective Order* to permit Mr. Rhinehart to access “Confidential” information in this proceeding, subject to all other terms of the *Protective Order*.

Respectfully submitted,

/s/ James F. Bendernagel
James F. Bendernagel

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Dated: September 14, 2018

Counsel for AT&T Services, Inc.

**PUBLIC VERSION
REDACTED - FOR PUBLIC INSPECTION**

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2018, I caused a copy of the foregoing Renewed Motion of AT&T Services, Inc. to Amend Protective Order, to be served via email on the following:

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Respectfully submitted,

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